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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 10th MEETING

Held at the Austria Center Vienna,
on Tuesday, 9 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

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Distr.: 18 April 1991

The meeting was called to order at 2.40 p.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 6 (continued) (A/CONF.152/C.1/L.12)

1. Mr. SCHROCK (Germany) introduced his delegation's proposal to add a new paragraph 1 bis to article 6 and to make amendments to paragraph 1 (A/CONF.152/C.1/L.12, paras. 2 and 3). One of the Canadian Government's written comments on the draft Convention (A/CONF.152/7) had been that the prescribed measure of liability - units of account per kilogram of gross weight - could create problems for goods that were not shipped by weight but by volume or pieces. In such circumstances, if the weight of the goods was not known, it would be impossible to calculate the limit of liability. The draft Convention at present provided for a limit based exclusively on the gross weight of goods lost or damaged, thus precluding the customer, in certain circumstances, from calculating his claim per package or per unit.

2. The question was, whether to have only a limit based on weight or, in addition, an alternative limit based on a package and freight unit. Had the Committee agreed on relatively high limits of liability, the alternative method of calculation might not have been considered necessary, although the concerns of the Canadian delegation would have remained. It was true that a limit per package might create practical problems, especially with containerized goods, but complications could not always be avoided and the simplest solution was not necessarily the most workable or equitable one. It had also been pointed out that the proposed new system would make the documentation required under article 4 somewhat complex. The suggested new paragraph 1 bis was based on article 6 (2) (a) of the Hamburg Rules, but since the bill of lading or other document mentioned in that provision was of a different nature from the document prescribed by article 4 of the draft Convention, the new subparagraph (a) stated a rebuttable presumption that the packages or other shipping units enumerated in the document were in fact packages or shipping units. That would cover the case of containerized goods.

3. It might be argued that the proposal did not solve all the problems involved in ensuring that the customer could make an appropriate claim. The customer would, however, be able to fall back on the general rules under which he would have to prove the number of packages or units lost or damaged as a basis for calculating his claim. If, therefore, the language of the proposal was of no direct use to the claimant, it would at least give him more options than he had under the draft Convention as it stood, since that excluded any possibility of basing a claim on a limit per package. He reiterated that the proposed system of an alternative method of calculation followed the pattern of article 6 (2) of the Hamburg Rules; it also reflected article 4 (5) of the Hague-Visby Rules.

4. Mr. HORNBY (Canada) thanked the German delegation for its proposal. It accurately reflected his own delegation's views with regard to the need for a limit per package or per shipping unit in the Convention. It had been argued that the absence of such a limit would lead to great difficulties if the cargo had been shipped otherwise than by weight, which was the only limit at present provided for in article 6 (1). Cargo was often shipped by volume or by package, particularly from developing countries or countries exporting primary products. How under the draft Convention as it stood, would the weight of lost cargo be determined if it

(Mr. Hornby, Canada)

had not been shipped on a per package or per volume basis and the operator removed it from the ship and it fell into the sea and disappeared? If it had not been shipped by weight, it would be very difficult to determine the basis of liability. The Canadian delegation therefore supported the proposal to add the limit per package or other shipping unit to the Convention; it would go a long way towards solving one of the problems that marine terminal operators in particular would face under the existing draft. The representative of Germany had referred to some of the problems that might arise with a limit per package, but in a great many countries that notion had been used successfully in litigation and was now well understood and applicable to the law of carriage. It fitted well into the Convention.

5. Mr. CASTILLO (Philippines) said that at its 8th meeting the Committee had decided to retain paragraph 1 (b) of article 6 on the ground that goods transported by waterborne craft were heavier and less expensive. That implied that different types of goods should be compensated differently for loss or damage, and various transport instruments had been mentioned in that connection. It was perfectly obvious, however, that one cubic foot of pelts and animal skins might be more valuable than a ton of grain or sugar, yet on the basis of the operator's liability under paragraph 1 (a) of article 6 their value would be the same per kilogram of gross weight of the goods damaged or lost. Furthermore, as the Canadian Government had aptly observed in its written comments (A/CONF.152/7), the present measure of liability could create problems for goods not shipped by weight but by volume or pieces. It was sound business practice to insure goods for adequate compensation in the event of loss or damage, but insurance was an activity in which the developing countries were not in a position to compete. His delegation therefore supported the German proposal.

6. Mr. CHRISTOV (Bulgaria) asked whether the words "units of account per package or other shipping unit" were to be introduced into both the subparagraphs of article 6 (1).

7. Mr. SCHROCK (Germany) said that paragraph 2 of his delegation's proposal (A/CONF.152/C.1/L.12) set out the changes that would result from the approval by the Committee of the alternative method of calculation. Those amendments would apply regardless of the Committee's decision not to delete article 6 (1) (b).

8. Mr. RUSTAND (Sweden) said that it had not been clear to him any more than to the representative of Bulgaria whether the package notion was to be introduced into both subparagraphs. However in the light of the explanation given by the representative of Germany, the intention appeared to be to have a dual system in respect of the carriage of goods by sea as well.

9. In its written submission to the Conference on article 6 (A/CONF.152/7/Add.1), his Government had expressed support for a limit per kilogram only. The discussion in the Working Group on International Contract Practices and at the twenty-second session of the Commission had highlighted the practical difficulties involved in introducing the package notion. After hearing the remarks made by the representatives of Germany and Canada he was no longer convinced that those practical difficulties could not be overcome. There were three main obstacles which had been discussed in the past. The first was the problem of defining what was meant by packages and units of account; an example had been given of how that might be solved by means of the corresponding provision of the Hague-Visby Rules.

(Mr. Rustand, Sweden)

The second obstacle was to determine how many packages or other shipping units a container held; that, however, could be solved by a burden-of-proof rule. The third obstacle was the additional rules regarding the document to be used by the operator. Sweden's position at the present Conference was very flexible. If a majority favoured the German proposal, it would be happy to join that majority.

10. Ms. SISULA-TULOKAS (Finland) asked whether the representative of Germany had any thoughts about the level at which unit limits should be set.

11. Mr. BONELL (Italy) said that his delegation would be prepared to support the proposal.

12. Ms. SKOVBY (Denmark) said that her delegation could not support the German proposal and did not believe that the unit notion was properly understood. Court cases had been withdrawn in Nordic countries because settlements based on the unit had been considered undesirable. For modes of transport such as road, rail and air there was only a weight limit, but claim problems were solved nevertheless. The Convention should not contain a double system for limits of liability.

13. Mr. OCHIAI (Japan) said that his delegation also opposed the German proposal. If the package notion was introduced, the Committee would have to solve the very difficult problem of defining a package or unit. Also, with the proposed "container clause" - the suggested new paragraph 1 bis - there still remained the very difficult problem of cases in which the document called for in article 4 (1) was not issued.

14. Mr. MORAN (Spain) said that his delegation could not support the German proposal and preferred the text as originally drafted. There were many complications with the limit per package whereas the limit per kilogram was adequate and straightforward. Being involved in the carriage of goods, the operator might have to redistribute goods received at the terminal to a variety of places and by a variety of forms of transport, perhaps by emptying containers, transferring the contents to another type of container and possibly even packaging them. The operator should perhaps assume a greater degree of liability for certain types of package, as the representative of the Philippines had indicated; that would involve certain contractual obligations. The limit per kilogram could still apply very flexibly and in a practical way.

15. Mr. PAMBOU-TCHIVOUNDA (Gabon) agreed that the introduction of a limit based on the notion of a package would be very complicated and virtually impossible to apply. It might be understood from the proposed text that a container and pallet were similar, yet in practical terms they were not interchangeable and did not serve the same purpose. Furthermore, nobody could tell what was in a container and the case might even arise where an empty container had to be covered by the same rules as a full one. He endorsed the objections to the German proposal put forward by the representatives of Spain and Japan and would prefer the draft to contain the limit per kilogram only.

16. Mrs. EL OTMANI (Morocco) joined in opposing the German proposal, not only for the reasons already advanced, but also because weight was invariably a criterion in determining liability in matters of transport; moreover, the application of a limit of liability per package or other shipping unit would pose considerable problems when containers were used, given that transport terminal operators often

(Mrs. El Otmani, Morocco)

received such articles without knowing or being in a position to determine their contents; in the case of maritime transport even bills of lading only listed what they were "said to contain".

17. Mr. ABASCAL (Mexico) approved the proposal, arguing that it offered more options to potential injured parties. Dual regulation would, moreover, make it easier to define the limits of liability and responsibility, especially in the case of goods that were not considered simply in terms of gross weight for transport purposes. Those familiar with the preparatory work in the Commission would recall the lengthy discussions of the difficulties inherent in a single limit of liability based on weight; such difficulties as might persist with regard to the definition of packages or other shipping units were surely no greater. In the final analysis, he considered the German solution to represent the lesser of two evils.

18. Mr. MUTZ (Observer, Intergovernmental Organization for International Carriage by Rail) stated, in response to the remarks made by the representative of Denmark, that a limit of liability per package was not entirely unknown in rail transport. What was more important, the German proposal permitted a maximum limit not less than the limit per kilogram of gross weight which had been set in the case of international carriage by road and by rail at 8.33 and 17 units of account respectively. In most cases, those limits guaranteed reasonable compensation, while other mechanisms connected with rail transport permitted full compensation. Recalling that the arguments put forward at the 8th meeting in favour of limits derived from the maritime sphere had been founded on the real value of merchandise transported, he urged the Committee to accept the German proposal as a logical means of taking account of the realities inherent in different modes of transport.

19. Mr. WEISER (International Union of Marine Insurance), speaking at the invitation of the Chairman, favoured the German proposal for the fact that it could be related to the existing conventions governing modern sea transport, as well as to the Multimodal Convention. He submitted that the proposal on liability drafted by the Commission marked a retrograde step when set against the mass of containerized cargo now to be found in ports and terminals. He added that those concerned with maritime transport, as well as tribunals and insurers, would not be taken by surprise if the dual system were introduced. He pointed out that the words "whichever is the higher" in the German proposal would deter a claimant from opting for the limit of liability per package or unit if it was lower than the limit per kilogram of gross weight; the proposal thus favoured all interested parties, including the owner of the cargo.

20. The CHAIRMAN invited the Committee to vote on the proposal in paragraph 2 of document A/CONF.152/C.1/L.12.

21. The proposal was rejected by 19 votes to 14, with 4 abstentions.

22. The CHAIRMAN noted that the result of the vote rendered obsolete the proposal in paragraph 3 of document A/CONF.152/C.1/L.12.

New article 6 bis (A/CONF.152/C.1/L.13)

23. Mr. SCHROCK (Germany) introduced the proposal in document A/CONF.152/C.1/L.13. The reasons for his delegation's suggestion that the Convention should include a provision on the aggregate liability of an operator resulting from all claims

(Mr. Schrock, Germany)

arising out of a single occurrence were set out in paragraph 7 of its written comments on the draft (A/CONF.152/7), to which he referred the Committee. The matter had been deliberated at length during the Commission's preparatory work. His delegation believed that the Convention should lay down a single aggregate amount for claims; the figure which it proposed was merely indicative, and was based on a professional assessment by a German ports authority of the highest global limit for a ship-owner liable for an amount calculated on the basis of the cargo of an average container ship.

24. Mr. RUSTAND (Sweden) expressed his delegation's strong endorsement of the German proposal and called attention to its comments on the matter in document A/CONF.152/7/Add.1. Swedish insurers had stressed that in the absence of a global limitation on the aggregate liability of transport terminal operators, the insurance market might not be inclined, or even have the capacity, to provide coverage on the scale required by very large terminals storing or handling enormous quantities of goods at one and the same time. Moreover, the cost of such cover, if it could be found, would obviously be very high, if not prohibitive. It was consequently the Swedish delegation's view that the Conference should reflect seriously on the matter, taking the German proposal as the basis for its deliberations. For his part, he was not convinced that the indicative figure was sufficiently high: his view was that it should be set high enough to allow for all normal accidents, but not catastrophic ones. The observations of representatives of the insurance industry would be welcome on that point. He suggested that if the principle underlying the proposal was approved, the actual figure should be discussed at the same time as those to be inserted in article 6 (1) (a) and 6 (1) (b).

25. Mr. MARSHALL (United Kingdom) agreed most strongly that a global limit of liability was called for. As the previous speaker had indicated, in responding positively to a request for cover from an operator with an extremely high liability, an insurer might see his own business unbalanced and his entire solvency threatened; that eventuality would be of considerable concern to insurance supervisory departments of governments. Moreover, in providing cover, an insurer must fix a limit; he could not commit himself to incalculable risks involving losses far beyond his own resources or his ability to reinsure. With unlimited liability, operators would have to bear burdens beyond those actually covered by their insurance; in case of catastrophe they, or the owners of a terminal - which might be a State - could be faced with literally devastating claims. The higher the limits of liability, the higher the price of the top layers of insurance protection would be, because of reduced competition for such business and the cost of the reinsurance that it would necessitate. He added in passing that the recent history of marine insurance had seen vertiginous drops in the availability of reinsurance.

26. He agreed with the representative of Sweden that the suggested limit of 10 million units of account was somewhat too low; it was his own strictly personal view that 20-30 million units might be more appropriate. In conclusion, he submitted that without some measure of global protection for a terminal operator, not only he, but the insurance market behind him, and perhaps beyond that even the entire economy of his country, could be placed in jeopardy.

27. Ms. FAGHFOURI (United Nations Conference on Trade and Development) joined in endorsing the principle behind the proposal. The extremely high level of potential liability that would result from the absence of a global limit would cause very serious problems for terminal operators, especially in the developing countries.

(Ms. Faghfouri, United Nations Conference on Trade and Development)

Conventions dealing with the liability of carriers using any mode of transport established a quantifiable maximum loss, which was of the order of a single cargo. Terminal operators could have potentially enormous values at stake, representing a great many cargoes; the possibility of unlimited accumulation of liability following an accident made it imperative to secure the highest possible insurance cover, whose cost would rise steeply with the liability limits. The developing countries had to rely heavily on reinsurance protection from the developed world; having to provide increased cover for terminal operators would make further demands on their scarce foreign exchange resources.

28. Insurers also had to quantify their own aggregate exposure and decide on the maximum they would pay in any single event. As the representative of the United Kingdom had remarked, the operator might not be covered beyond that maximum. Moreover, if he was to stay in business, the terminal operator must obviously cover his costs; he would naturally pass on increased charges to shippers, and that could only have an adverse effect on international trade. That being said, it would be very hard to find a commonly acceptable and realistic global liability limit that was neither too high for some nor too low for others. The matter called for further very careful consideration, and perhaps a quest for new approaches, especially in view of the constantly high levels of loss occurring in many terminals throughout the world.

29. Mr. ROJANAPHRUK (Thailand) said he found the German proposal as drafted difficult to understand. There seemed to be a contradiction between its two sentences, the first stipulating that in no case should the aggregate liability exceed 10 million units of account, the second appearing to provide for such cases. In his view, the second sentence covered the essence of the matter, but he was not sure that the article needed to refer to the proportional distribution of the amount payable; that should be an automatic procedure.

30. Mr. SWEENEY (United States of America) pointed out that the purpose of the draft Convention was to rationalize an existing industry in which, in his country, there was at present no global limit on the operator's liability insurance or one applicable to self-insured terminals. Albeit with the best of intentions, the proposal sought to impose an artificial cap - something which had never been discussed in the Commission's preparatory work - on limits of liability. Past experience had shown such action to be an exercise in inflexibility, with the most harmful consequences, as exemplified by the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. Those instruments also contained caps, yet the huge oil-related disasters which had occurred since the Torrey Canyon incident in 1967 had been overwhelmingly greater than the applicable caps in terms of damage caused and actual costs, demonstrating them to be woefully inadequate. Moreover, the consequences of the proposal might prove extremely expensive for transport terminal operators because, notwithstanding possible competition, insurance companies might use the provision as a pretext for selling only expensive policies covering the maximum liability. Lastly, he clearly recalled that when the question of the amount of insurance cover available in oil pollution disasters - and also in the case of accidents to multi-engined aircraft - had been discussed, the insurance industry had admitted to its ability to deal with catastrophic losses in the range of US$500 million. He therefore considered that even if the principle of liability capping was approved, the figure advanced in the German proposal was clearly too low.

(Mr. Sweeney, United States of America)

31. To sum up, there was no global limit at present on the liability of operators of transport terminals; such a limit had never been talked about in the past; and arbitrary caps on liability had been shown not to work. For those reasons, the United States delegation opposed the German proposal.

32. Mr. CHRISTOV (Bulgaria) said that article 6 (1) (c) of the Hamburg Rules made a clear reference to aggregate liability for losses and delays. He felt it would be best if the Convention catered for aggregate liability as laid down in that provision of the Hamburg Rules.

33. Ms. SISULA-TULOKAS (Finland) associated herself in principle with the view expressed by the United States representative. In her view, a global limit of liability was essentially a concept of maritime law. There were many activities on land where great risk was involved but liability was unlimited. It was difficult to see why the notion of limited aggregate liability should be introduced into a draft Convention which was concerned mainly with land operations.

34. Mr. FILIPOVIĆ (Yugoslavia) opposed the German proposal because he felt that a global limit was necessary only in the case of hazardous activities involving great and incalculable risk. In the operation of transport terminals, liability was contractual and already limited. He did not think it was appropriate to introduce another layer of limitation. Presumably, any ceiling on aggregate liability that might be imposed should depend on the size of the terminal.

35. Mr. ZHAO Chengbi (China) said that he did not favour the proposal. The knowledge that liability was limited to 10 million units of account might actually encourage negligence. He also felt that the Convention was being impelled to focus more on the interest of operators than on that of customers. It was necessary that both interests should be protected in order to allow the greatest possible number of countries to accept the Convention.

36. Mr. OCHIAI (Japan) endorsed the views of the United States and Chinese representatives.

37. Mr. SCHROCK (Germany) said that one of the reasons advanced by the representative of the United States for not supporting the proposal was that an organized transport terminal industry already existed in that country without benefit of a global limitation of liability. One existed in Germany as well. It should be kept in mind, however, that in many countries the operator's liability was not covered by mandatory law and he could escape it or reduce it contractually.

38. The German proposal should not have come as a surprise to the United States delegation. There were several references to such a possibility in the preparatory work for the Conference. For example, in the report of the Working Group on International Contract Practices on the work of its eleventh session in 1988 (A/CN.9/298), there was a suggestion in paragraph 97 that when the draft Convention was circulated for comments Governments might consider the possibility of establishing an overall limit to the liability of the operator in order to cover all claims arising from a single catastrophic event. His predecessor had been present at that session and had prepared a memorandum stating that the concept of global limitation was well known in maritime law; that the maximum liability that could arise under article 6 as it stood would lead to an incalculable and uninsurable risk for the operator of the transport terminal; that, since it would be difficult to

(Mr. Schrock, Germany)

find a formula that could fix a global limitation generally and uniformly for all transport terminals, the global limit might be based on the size of the terminal or on its annual turnover; and that the Secretariat might look into current practice and report to UNCITRAL on the matter at its next session. Other references to the possibility of limiting aggregate liability could be found in the UNCTAD document on the commercial risk sector in container terminal management (ST/SHIP/12) and in paragraph 3 (b) of the compilation of comments by Governments issued for the twenty-second session of UNCITRAL (A/CN.9/319/Add.1).

39. Mr. RUSTAND (Sweden) said that the question had indeed been raised by the delegation of the Federal Republic of Germany at the eleventh session of the Working Group on International Contract Practices. Regarding the system in force in the field of oil pollution, including that in the two oil pollution conventions to which the United States had referred, he observed that the oil pollution compensation system had operated successfully for 12 years. The system had been ratified by more than 50 States and the global limit had been exceeded only once. There had been an effort to raise the ceiling in 1984, supported at the time by the United States, and an instrument had been drafted on lines suggested by that country. The United States Congress, however, had decided that the United States should not ratify the instrument, greatly to the regret of the rest of the world, and had opted instead for unlimited liability. There were, however, many examples of global liability limits that were working well and many States had found that it was in their interest to be parties to the instruments concerned. Finland had said that there were no examples of such limits for land-based activities, but there were in fact several in the nuclear field as well as in some transport-related conventions. It would be useful for the Committee to hear the comments of the insurance industry on the subject.

40. Mr. ILLESCAS (Spain) said that the Convention was dealing with an industrialized and land-based activity which, though linked with transport, was not in itself a transport activity. Accordingly, transport risks, and maritime risks in particular, should not apply. Land-based activities were not usually subject to a global liability limit. Also, there was no tradition of quantitative limits on liability for fault or neglect on the part of the operator under article 5 (2). His delegation could not, therefore, support the proposal.

41. Ms. SKOVBY (Denmark) opposed the proposal on the ground that the operation of a transport terminal was a land based activity. If the Committee decided to take a maritime approach, however, and introduce a global limit, it would need to be based on the area of the terminal in order to safeguard small terminals.

42. Mr. ROMAN (Belgium) said that he could support the proposal if it took into account the nature of the goods handled in a particular terminal instead of making uniform provision for all kinds of terminal.

43. Mr. MKWENTLA (Pan Africanist Congress of Azania) said that, under his country's legal system, where a provision expressed negatively contained the word "shall", the whole provision became peremptory. The first sentence of the German proposal was therefore an imperative one and there was no need for the second sentence.

44. Mr. SWEENEY (United States of America) said that one reason why the Convention was attractive to the United States was that laws on liability were a matter purely for its various states. Thus, there were 50 separate laws on the liability of

(Mr. Sweeney, United States of America)

operators of transport terminals. In some states, it was a bailee's liability, meaning strict liability; in others, it was a negligence-based contractual liability without exculpatory clauses, and in still others, a negligence-based liability with exculpatory clauses. It was a vastly complicated question. It was not correct to assume that all over the world a terminal operator could limit his liability by means of a contractual clause. It was certainly not so in the United States. In many places, a contractual clause that permitted the operator to limit his liability for negligence would be held to be contrary to public policy.

45. Mr. WEISER (International Union of Marine Insurance), speaking at the invitation of the Chairman, said that the Union's members came from developing as well as developed countries. He therefore supported the German proposal. The representatives of Sweden and the United Kingdom had pointed to the likely financial consequences if the Convention provided for unlimited liability without a global ceiling. To impose a global ceiling would not mean that insurers would offer only policies for that figure. Competition would prevent that happening, and in any case transport terminal operators would sometimes wish to bear the remaining risk themselves.

46. Only in exceptional cases would losses exceed a reasonable maximum. Transport terminal operators were not, after all, exposed to the level of risk run by oil tanker owners. However, without a global limit it was only too likely that in many markets, especially in developing countries, the risks involved would call for costly reinsurance protection. Admittedly, the calculation of liability according to kilograms of gross weight would radically alter the basis of liability assumed by terminal operators. Under the existing well-balanced system of cargo and liability insurance, cargo owners and insurers were satisfied if the operator's contractual liability was kept relatively low. The new system would not eliminate the need for cargo insurance, since the cargo owner needed protection against loss or damage to the cargo while in transit. Nor would cargo insurance premiums be reduced; recourse actions before foreign courts were extremely expensive and would result in increased costs for the consumer. The proposal for a global limit was not a new idea. Transport terminal operators already bought fixed amounts of insurance cover which might not be sufficient indefinitely. As the representative of the United Kingdom had pointed out, a system of unlimited liability would not mean the insurer granting the terminal operator unlimited cover: cover would simply be kept to a fixed limit at higher cost. The operator would have to bear the remaining burden, in order to avert the risk of bankruptcy and severe economic damage to the local trading community. That was why the International Union of Marine Insurance supported the German proposal for a global limit, provided the amount fixed was reasonable.

47. Mr. LEBEDEV (Union of Soviet Socialist Republics) noted that much had been said both for and against the introduction of a global liability limit. It should not be forgotten that the draft must be acceptable to all parties, including developing countries and industrial concerns. There was a risk that without a global limit, it would be less acceptable to the latter. It had been argued that a global limit would substantially increase premiums and would adversely affect both transport terminal operators and industry in general. That argument should not be accepted at face value without considering the experience of operators themselves in different countries with regard to liability insurance, or hearing what the insurance companies had to say. In many legal systems, the operator's liability was already limited under insurance policies. In article 6 the aim was, of course, to fix an objective limit for liability at a high aggregate level. In his view, the proposed change was unlikely to inconvenience either operators or insurers.

(Mr. Lebedev, Union of Soviet Socialist Republics)

48. He drew attention to the words "in no case" in the German proposal. Did the phrase signify that the amount payable by the operator would not exceed 10 million units of account even if the basis of the liability was an act of negligence on his part? In the second sentence, it was not clear how much the operator would have to pay. The representative of Germany had referred to the antecedents to the proposal for a global limit; he had also argued that the instruments governing compensation for oil pollution bore out the need for a global limit in the Convention. There was no need for such comparative exercises, because the activities envisaged in those instruments and in the present draft had nothing in common.

49. Mr. SCHROCK (Germany), replying to the observations made in the discussion of his proposal, said that the suggested new article 6 bis consisted of two sentences. He requested that a separate vote be taken on the first sentence before proceeding, if necessary, to a vote on the second. It was the first sentence that enshrined the basic principle of a global limit of liability. It was to be construed as meaning that where the aggregate liability of the operator resulted from a single occurrence, the amount payable by the operator would not exceed 10 million units of account. However, in the light of the discussion, he now proposed the following reformulation of that sentence:

> "The aggregate liability of the operator resulting from all claims arising out of a single occurrence shall not exceed [...] units of account."

If the Committee accepted the principle of the global limit, it could then decide on an appropriate figure.

50. In the second sentence, the issue was the principle underlying the distribution of that sum in cases where damage caused by a single occurrence exceeded it. If the Committee approved the first sentence, some revision might be called for in the second.

51. Mr. LEBEDEV (Union of Soviet Socialist Republics) asked whether the German proposal would form a separate article, to follow article 6. If so, how would it relate to article 8, which excluded the limitation of liability in certain circumstances?

52. The CHAIRMAN explained that the scope of the reformulated proposal would be confined to article 6. It would not apply in the circumstances envisaged in article 8. Its proper place would be within and at the end of article 6, because if it was made a separate article its application would extend to the whole of the Convention. He asked the representative of Germany whether the proposed aggregate figure would apply to the limits of liability that might be agreed by the operator under article 6 (4).

53. Mr. SCHROCK (Germany) thought it unlikely that the operator could be made liable for claims which, in aggregate, exceeded the global limit. As to article 8, it was not yet clear how his proposal would be affected by it. In his view, the new article 6 bis could either stand alone or form part of article 6, depending on the Committee's decision.

54. The CHAIRMAN invited the Committee to vote on the first sentence of the new article proposed by Germany in document A/CONF.152/C.1/L.13, as orally amended by its sponsor.

55. The sentence was rejected by 18 votes to 9, with 8 abstentions.

56. The CHAIRMAN said that the result of the vote rendered obsolete the remainder of the proposal in document A/CONF.152/C.1/L.13. Since there were no further proposals for article 6, he would take it that the Committee approved the text of article 6 reproduced in document A/CONF.152/5, as amended at the 8th meeting, and referred it to the Drafting Committee.

57. It was so decided.

58. Ms. SKOVBY (Denmark) asked whether the term "consignment" in article 6 (2) referred to the goods evidenced by the document prescribed in article 4.

59. The CHAIRMAN said that under article 6 (2) the total charges payable to the operator for a consignment signified the sum payable for all his services in respect of the goods.

The meeting rose at 5.35 p.m.

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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 11th MEETING

Held at the Austria Center Vienna,
on Wednesday, 10 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

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Article 9

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Distr.: 18 April 1991

The meeting was called to order at 9.45 a.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 4 (continued) (A/CONF.152/C.1/L.43)

1. Mr. INGRAM (United Kingdom), introducing his delegation's proposal (A/CONF.152/C.1/L.43), said that it represented a recasting of its earlier proposal for a new article (A/CONF.152/C.1/L.31), which had already been discussed. Its main purpose was to enable the carrier or other person having an interest in goods placed in charge of an operator to be sure that it was clear from the documentation that the goods he was entrusting to him were goods to which the Convention applied.

2. Under paragraph (1) of the proposal, the carrier could request the operator to confirm three points. The only new element was confirmation that the goods were in international carriage. Paragraph (2) stated what the operator must do on receipt of such a request. Both parties would then be aware that the Convention applied to the goods in question. Paragraph (3) indicated what would happen if the carrier failed to make the request in question. Paragraph (4) set out the consequences of the document that indicated that the goods were involved in international carriage.

3. The changes his delegation was suggesting were not as great as they might appear and were designed to show clearly when the Convention applied.

4. Mr. RUSTAND (Sweden) thought that the idea underlying the United Kingdom proposal could be dealt with more simply by making minor amendments to article 4 (1) (a) and (b), specifying that the goods should be identified as being involved in international carriage.

5. Mr. TARKO (Austria), referring to the words "A carrier or other person having an interest in goods" in paragraph (1), pointed out that the Convention dealt with the duties of an operator and not those of a carrier or other persons. He wondered why paragraph (1) apparently called for three documents, whereas paragraph (2) only provided for two. With respect to paragraph (4), he would like to know the exact meaning of the term "absolute confirmation", since the paragraph as drafted would cause problems in his country. The proposal was similar to the existing text, which should be kept as already amended.

6. Ms. SKOVBY (Denmark) asked why the presumption in paragraph (5) of the proposal was only that the goods had been received in good condition, and not also that they were in international carriage.

7. Mr. INGRAM (United Kingdom) said that he was more concerned with the principle behind his delegation's proposal than the drafting. It might, as the Swedish representative had suggested, be possible to provide for the intended result by amending the existing text of article 4.

8. Referring to the comments by the Austrian representative, he said that the reference to carrier or other person was designed to spell out the meaning of the word "customer" and that the text did not create any new obligation for the carrier or other person. Paragraph (1) did not provide for any new document; there were still only two, as indicated in paragraph (2). The words "absolute confirmation" meant that the presumption was not rebuttable.

(Mr. Ingram, United Kingdom)

9. As to the point raised by the representative of Denmark, he said that the question of the goods being involved in international carriage was dealt with in paragraph (4).

10. Mr. ROJANAPHRUK (Thailand), referring to paragraph (1) of the United Kingdom proposal, thought that the expression "goods which he has placed" should be amended to read "goods which have been placed".

11. Mr. ABASCAL (Mexico) said that the introduction of a new element which would require the operator to acknowledge that the goods were involved in international carriage could give rise to certain problems. He would like to know what would happen if an operator who had reasonable doubts as to whether the goods were involved in international carriage refused to sign the document because of those doubts.

12. Mr. MORAN (Spain) said that article 1 (c) gave a clear definition of the term "international carriage" as carriage in which the place of departure and the place of destination were located in two different States. To provide for the operator to acknowledge the fact that goods were in international carriage would be to introduce a subjective aspect, since the operator could do so on a unilateral basis. If the United Kingdom wished to press its proposal, the most appropriate solution might be to amend article 1 (c).

13. Mr. RUSTAND (Sweden) thought that the Committee should vote on the proposal and that the Drafting Committee should then be requested to prepare an appropriate text.

14. Mr. LEBEDEV (Union of Soviet Socialist Republics) thought that it might be difficult to reject a text that had already been adopted by the Committee and to replace it by the new text proposed by the United Kingdom. However, some of the elements of the proposal might be taken into account by the Drafting Committee. One of those points was to be found in paragraph (2) of the United Kingdom proposal, which gave a clear indication of when the reasonable period of time began, namely, on receipt of a request made under paragraph (1).

15. Mr. ZHAO Chengbi (China) said that article 2 showed clearly that the Convention covered goods involved in international trade. The provisions of the Convention were all designed within that general framework. Since the United Kingdom proposal provided for acknowledgement that goods were involved in international carriage, his delegation considered it to be necessary.

16. The CHAIRMAN invited the Committee to vote on the United Kingdom proposal (A/CONF.152/C.1/L.43).

17. The proposal was rejected by 27 votes to 3, with 2 abstentions.

Article 1, proposals for new subparagraphs (continued) (A/CONF.152/C.1/L.37)

18. The CHAIRMAN said he understood that an earlier proposal by the United Kingdom for the addition of a definition of "person" in article 1 (A/CONF.152/C.1/L.37) was related to the proposal that had just been rejected. He asked the United Kingdom representative if he still wished to have that proposal discussed.

19. Mr. INGRAM (United Kingdom) said his proposal for article 1 did not bear any particular relation to his proposal for article 4. The word "person" was used throughout the Convention, and his delegation believed it would be useful to define it.

20. Mr. BONELL (Italy) said that he could not support the proposal, which would introduce unnecessary complications into the Convention. The concept of "person" was understood differently in different legal systems, and if one particular definition was adopted, there would be great difficulty in finding exact equivalents in other languages.

21. Mr. OCHIAI (Japan) shared that view. Under Japanese law, a partnership or private body which was not incorporated was not a person in the legal sense, and the definition would therefore cause legal difficulties. In addition, the definition shoud not include States, because of the concept of national immunity.

22. Mr. INGRAM (United Kingdom) said there was in fact a long-standing precedent for the definition proposed: its wording had been taken from the 1969 Convention on Civil Liability for Oil Pollution Damage. In many cases, operators were port authorities, which were public bodies, and it was important to make clear in the definitions that such bodies were covered by the Convention.

23. Mr. GOKKAYA (Turkey) agreed that it was important to make clear that the word "person" covered not only individuals but public bodies: in his country, transport terminals were normally run by State-controlled companies. However, he suggested that a more appropriate formulation might be the one used in article 1 of the Convention on the Limitation Period in the International Sale of Goods, where "person" was defined as including any corporation, company, partnership, association or entity, whether public or private, whic could sue or be sued.

24. The CHAIRMAN invited the Committee to vote on the United Kingdom proposal (A/CONF.152/C.1/L.37).

25. The proposal was rejected by 24 votes to 5, with 4 abstentions.

Article 7 (A/CONF.152/C.1/L.14)

26. Ms. ZAWITOSKI (United States of America) said that the discussions that had already taken place in the Committee on the subject of aggregate liability had met her delegation's concern regarding article 7 (3). It would therefore withdraw its proposal (A/CONF.152/C.1/L.14).

27. Article 7 was approved.

Article 8 (A/CONF.152/C.1/L.3, L.25)

28. Miss VAN DER HORST (Netherlands), introducing her delegation's proposal (A/CONF.152/C.1/L.25), said her Government had serious objections to the inclusion of agents and servants in paragraph (1) of article 8. In order to exercise his profession, an operator needed to be able to assess the risks involved and to insure against them. If the limit on the operator's liability could easily be broken, the whole concept of limitation would become illusory, since operators would still have to insure themselves for the full amount of damages. Increased risk for the operator would inevitably be reflected in increased charges by insurers. In any event, the party interested in the goods would normally have taken out transport insurance to cover the goods through the entire transport process. Limits of liability should be broken only in exceptional cases, if the value and significance of those limits were not to be reduced.

29. Deletion of the words "himself or his servants or agents" in paragraph (1) would mean that the operator would not lose entitlement to limitation of liability unless the act leading to the loss or damage could be attributed to him personally

(Miss van der Horst, Netherlands)

or, where the operator was in fact a corporation, to a person acting at managerial level in that corporation. That would be in line with article 8 of the Hamburg Rules and with article 21 of the Multimodal Convention. Her delegation's proposal was all the more necessary in view of the fact that, under article 8, limitation would not be applicable if the operator's servants or agents were acting outside the scope of their employment.

30. She pointed out that the comments made by the International Maritime Committee on article 8 (A/CONF.152/7/Add.2, p. 6) were in line with her delegation's views on the matter.

31. Mr. TARKO (Austria) could not support the proposal. The principle of unlimited liability for acts or omissions committed with intent or with recklessness was already accepted in many States, and it was only right that the operator should be fully liable for such acts. It was also generally known that in many cases the operator was not a physical person but a legal entity - including a State, or a subdivision of a State. It was hardly likely that acts resulting in loss or damage would be committed by such entities themselves; they were more likely to be committed by the operator's servants or agents, who were actually dealing with the goods. According to the principle of culpa in eligendo, the operator had a duty to choose suitable persons as his servants or agents, and he should be liable without limitation for any acts or omissions on their part. There were thus good reasons why the existing text of paragraph (1) should be kept.

32. Mr. INGRAM (United Kingdom) regarded the amendment proposed by the Netherlands as the most crucial of all those that had been put forward. Article 8 as now drafted was the provision which had caused the greatest alarm to all the commercial interests that his delegation had consulted. It was vital that liability should be insurable and that it should have reasonable limits. A provision which would remove all limits in the case of acts or omissions by servants or agents would have disastrous implications for insurance, and he would urge that the Netherlands proposal be adopted.

33. Mr. FILIPOVIĆ (Yugoslavia) pointed out that the limits of liability set in the draft Convention were in fact very low: as he saw it, low limits were not compatible with the principle of unbreakability. He was therefore opposed to the proposal.

34. Mr. CHRISTOV (Bulgaria) said that he too was unable to support the proposal.

35. Ms. SKOVBY (Denmark) urged the Committee to consider carefully the implications of excluding from the article acts or omissions committed by servants or agents. In a recent case in her country, the chief security officer at the Scandinavian Airlines System cargo centre had been accused of misappropriating a sum equivalent to AS 100 million over a period of five years.

36. Mr. BRUNN (International Union of Marine Insurance), speaking at the invitation of the Chairman, supported the Netherlands proposal, and endorsed the arguments advanced by the United Kingdom representative. It would be very expensive, if not impossible, for an operator to obtain insurance cover for unlimited liability for fraud committed by his servants or agents. The principle of breakability was justified if the operator himself acted fraudulently, but that principle should not be applied to acts committed by servants or agents. He pointed out that the increased cost of insurance cover for such liability would ultimately be borne by the consumer and would thus have economically disastrous repercussions.

37. Mr. SWEENEY (United States of America) also opposed the proposal. In practice, it would be very difficult to prove that the persons concerned had acted with intent, recklessly, or with knowledge that loss or damage would probably result. Breaking liability limitations was justified only in extreme cases, where the very existence of an enterprise was at risk. In any event, servants or agents of the operator employed in sensitive areas, such as in the handling of jewellery or currency, would normally be bonded. He saw no need for the proposed deletion.

38. Mr. BONELL (Italy) said he too opposed the proposal. In modern commerce, it was most unlikely that any acts resulting in damage would be committed by the operator himself; normally, it would be the behaviour of his servants or agents that would be at stake.

39. The CHAIRMAN invited the Committee to vote on the Netherlands proposal (A/CONF.152/C.1/L.25).

40. The proposal was rejected by 21 votes to 8, with 4 abstentions.

41. Mr. SCHROCK (Germany), introducing the proposal contained in the second paragraph of document A/CONF.152/C.1/L.3, said that the same proposal had been made during the preparatory work on the draft Convention and stood halfway between the Commission's text and the proposal just voted upon by the Committee. In addition to the two models referred to in the third paragraph of the document, he also wished to mention article 7 (2) of the draft under consideration, as adopted by the Committee, which also included a reference to the scope of employment, a concept well known in many jurisdictions.

42. The proposal contained in the first paragraph of document A/CONF.152/C.1/L.3 was withdrawn in view of the rejection of the proposal in document A/CONF.152/C.1/L.25.

43. Mr. SERVIGON (Philippines) said that in his country's legal system, the concept of intent included the knowledge that loss, damage or delay would probably result from an act or omission. His delegation would therefore prefer paragraphs (1) and (2) of article 8 to end with the word "recklessly", the remainder of the text of both paragraphs being omitted.

44. The CHAIRMAN said that the interpretation just given by the Philippine representative was not universally accepted; moreover, the expression in question appeared in a large number of international conventions and could not be dropped without the risk of an *a contrario* interpretation of the provisions of those instruments.

45. Mr. RUSTAND (Sweden) said that he supported the proposal and endorsed the introductory remarks made by the German representative. A similar provision also appeared in article 10 of the Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) adopted at Geneva in 1989.

46. Ms. SKOVBY (Denmark) said that she also supported the German proposal, which coincided with the interpretation adopted in her country. Raising a further point in connection with article 8, she asked whether the absence of a reference to "other persons" in paragraph (1) was due to an oversight; such a reference appeared twice in paragraph (2).

47. The CHAIRMAN said that the omission was deliberate and represented a compromise solution adopted following lengthy discussions during the preparatory work on the draft.

48. Mr. FALVEY (United States of America) said that when the issue raised in the German proposal had been discussed in the Commission, his delegation had made the point that if an act done with intent to cause loss, damage or delay was performed within the scope of the employment of the person committing the act, then it was the operator himself, as that person's employer, who was responsible. He could not support the German proposal.

49. Mr. FILIPOVIĆ (Yugoslavia) said that if the proposal were adopted, the burden of proof would be so heavy that the operator would, in effect, never lose the right to the benefit of the limitation of liability in a case of loss, damage or delay resulting from an act or omission by his servants or agents. He, too, was unable to support the proposal.

50. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that a distinction had to be drawn between transport conventions and a convention dealing with transport terminals; to invoke the provisions of certain transport conventions was not necessarily convincing in the present context. Referring to the question raised by the Danish representative, he said that although the question of intentionally harmful or reckless acts or omissions by other persons of whose services the operator made use for the performance of the transport-related services was not expressly settled in the Convention, it would be incorrect to conclude that such acts or omissions could not lead to the operator's loss of his right to the benefit of the limitation of liability. The question had to be settled in each separate case on the basis of the applicable national law.

51. The CHAIRMAN invited the Committee to vote on the proposal by Germany in the second paragraph of document A/CONF.152/C.1/L.3.

52. The proposal was rejected by 22 votes to 10, with 3 abstentions.

53. The CHAIRMAN said that, in the absence of further proposals on article 8, he would take it that the article had been adopted.

54. It was so decided.

Article 9 (A/CONF.152/C.1/L.40, L.55)

55. Mr. ROMAN (Belgium), introducing his delegation's proposal on article 9 (A/CONF.152/C.1/L.40), said that the passage whose deletion was being proposed placed a very heavy burden of proof upon the operator. Moreover, the concept of negative proof was unfamiliar in his legal system, as in many others.

56. Mr. BONELL (Italy) said that, as he understood the provision in the chapeau of article 9, negative proof was not required; what had to be proved was the operator's actual knowledge of the goods' dangerous character.

57. Mr. HORNBY (Canada) concurred with that interpretation. While sympathizing with the Belgian delegation's concern, he considered the present text to be satisfactory.

58. The CHAIRMAN wondered whether the meaning of the provision might not be made clearer if the words "and if" were replaced by the words "or if".

59. Mrs. PIAGGI DE VANOSSI (Argentina) said that the text would be much clearer if the negative language at present employed ("... does not otherwise know ...") were replaced by a positive formulation.

60. The CHAIRMAN thought that the point just raised, as well as his own suggestion, might be referred to the Drafting Committee.

61. Mr. OCHIAI (Japan) expressed support for the draft in its present form. Article 13 (2) of the Hamburg Rules, which had served as the model for article 9, contained the expression "and ... does not otherwise have knowledge of their dangerous character".

62. Mr. ZHAO Chengbi (China) said that he also preferred the existing text, which was equally fair to both the operator and the customer. It should not be forgotten that the storage and transport of dangerous goods involved many issues and could affect many persons other than the operator or the customer; it was quite natural, therefore, that special requirements should be addressed to both.

63. Mr. BONELL (Italy), with reference to the drafting amendment suggested by the Chairman, felt that it would be difficult to substitute "or" for "and" in the fourth line of article 9, since, in his understanding, the text was intended to stipulate when the operator was entitled to take extraordinary measures. If the dangerous goods were not marked, labelled, packaged or documented in accordance with any law or regulation relating to dangerous goods applicable in the country where the goods were handed over, an additional condition was laid down, namely, that the operator did not otherwise know of their dangerous character. In consequence "and" was needed rather than "or".

64. As for the suggestion by the representative of Argentina that the article should be formulated in positive rather than negative terms, he agreed that such an approach would make for a clearer and more straightforward provision. Indeed, such a positive formulation had been employed in the early stages of discussion several years before, when the text had stated that the customer must label or otherwise inform the operator in the case of dangerous goods, but the Working Group had changed to the present approach because the Convention dealt with the liability of the operator of a transport terminal and not with any contract between the operator and his customer. It had considered that the duties of the customer lay outside the scope of the Convention. The provision had therefore been shortened to deal solely with the rights of the operator and given a negative formulation. A return to the original approach of a formulation in positive terms would call for additional work that could not be left to the Drafting Committee.

65. Mr. INGRAM (United Kingdom) supported the Belgian proposal. The rights conferred on the operator were not absolute: he was entitled merely to take all precautions the circumstances might require and to be reimbursed for their cost, and it was irrelevant whether or not he knew unofficially that the goods were dangerous.

66. Mr. CHRISTOV (Bulgaria) supported the Belgian proposal.

67. Mr. RUSTAND (Sweden) expressed his full agreement with the comments made by the representative of Italy.

68. Ms. SKOVBY (Denmark) observed that article 9 constituted in fact an exception to the provisions of article 5, because if the operator took in dangerous goods without knowing that they were dangerous, he was not liable for loss or damage to

(Ms. Skovby, Denmark)

the goods resulting from the measures provided for in article 9. In her view, as she had already suggested on a previous occasion, article 9 should be placed closer to article 5. She also opposed the deletion proposed by Belgium since, in many cases, it was left by agreement to the operator to mark or label dangerous goods and the proposed deletion might give him an opportunity to disclaim responsibility. The words in question were also needed in such cases because it was of great importance to a subsequent carrier that dangerous goods be marked.

69. The CHAIRMAN invited the Committee to vote on the Belgian proposal (A/CONF.152/C.1/L.40).

70. The proposal was rejected by 29 votes to 3, with 1 abstention.

71. Ms. SISULA-TULOKAS (Finland), introducing her delegation's proposal (A/CONF.152/C.1/L.55), said that its purpose was to avoid unnecessary danger and liability situations by inserting a straightforward sentence before the first sentence of article 9 (1) to the effect that the operator must be informed of the dangerous character of the goods.

72. Mr. BONELL (Italy) said that it might be argued that the proposal stated an obligation of the customer and therefore lay outside the scope of the Convention. However, in the light of the discussion and of the points made by the representative of Belgium, he considered it worth clarifying the matter. Since the wording of the proposal avoided an explicit statement of the customer's duty, he felt able to support the amendment, especially as it would avoid possible misunderstandings with respect to the other provisions.

73. Mr. PAMBOU-TCHIVOUNDA (Gabon) expressed his support for the Finnish proposal, since it clarified a situation that had been left implicit. The original text considered only a negative possibility. The Finnish proposal had the advantage of making explicit the obligations of all parties, and especially of the customer or person who handed the goods over to the operator.

74. Ms. SKOVBY (Denmark) also supported the proposal.

75. Mr. FATHALLA (Observer, United Nations Environment Programme) also supported the proposal, which was along the same lines as provisions in several other conventions, such as article 13 (2) of the Hamburg Rules.

76. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the Finnish proposal was fully understandable and in substance not a divisive issue. However, the suggested sentence was modelled on the first sentence of article 13 (2) of the Hamburg Rules and used language that, in his opinion, was not appropriate for article 9 of the present draft Convention, which assumed that the customer would mark, label and submit documents concerning goods that were dangerous in keeping with the rules and regulations applicable in the country where the goods were to be delivered. The addition of the proposed sentence appeared to him to be inconsistent in the context of article 9 and would make it necessary to reconstruct that provision. The whole issue of the dangerous character of goods varied according to the nature of the operation concerned. The functions of the operator of a transport terminal and of a carrier were different in that respect. In his view, the present text was sufficiently flexible and therefore preferable.

77. Mr. ROJANAPHRUK (Thailand) said that although the idea behind the Finnish proposal was acceptable he did not think that such a sentence should be included in article 9, or even anywhere in the present Convention. The text was modelled on the first sentence of article 13 (2) of the Hamburg Rules, but those Rules contained a general provision on the subject. It was the task of the Conference to adopt a Convention on the liability of operators of transport terminals. The purpose of article 9 was that if the operator had not known that the goods were dangerous, he was entitled to receive reimbursement for all costs incurred by him in taking special measures with regard to them. It was thus inappropriate that it should contain a provision requiring the dangerous nature of the goods to be specified.

78. Mr. TARKO (Austria) said that under the Finnish proposal the operator must be informed about the dangerous nature of the goods, but no provision was made for a sanction if he was not so informed. It would therefore be preferable to stick to the present text.

79. Mr. OCHIAI (Japan) asked who would have the duty of informing the operator about the dangerous character of the goods. He supported the present text.

80. Mr. SOLIMAN (Egypt) expressed his support for the Finnish proposal.

81. Mr. ZHAO Chengbi (China) said that he had abstained in the vote on the Belgian proposal. The aim of article 9 should be to make the operator take all necessary precautions when handling dangerous goods. The Finnish proposal made it necessary to inform the operator and draw his attention to the dangerous character of the goods. Even if dangerous goods were so marked, the operator might not pay attention or might not realize the nature of the danger or might be unfamiliar with certain special categories of dangerous goods. He therefore supported the proposal, but suggested that it be forwarded to the Drafting Committee for further improvement.

82. Mr. RUSTAND (Sweden) agreed with the representatives of the USSR and Austria concerning the discrepancy between the obligation placed upon the person handing over the goods and the lack of sanction to back up that obligation. In the Hamburg Rules, for instance, the shipper was liable to the carrier. Since it was difficult to introduce an obligation without also introducing a sanction, he preferred to stick to the basic text.

83. He also drew attention to the notion of "property" in subparagraph (a), because it was not clear to him whether the danger to property referred to included danger to the environment. Other recent conventions had tried to make explicit mention of danger to the environment rather than include it under the notion of "property". It was a question of drafting rather than of substance to which he hoped attention would be given.

84. The CHAIRMAN said that, in his personal view, the term "property" as used in the present Convention covered the environment and its protection.

85. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that he supported the idea contained in the Finnish proposal, but found it difficult to see how the compulsory element could be fitted in. He agreed with the representative of Japan that the person who should inform the operator had not been clearly identified.

86. Mr. RAO (India) said that there appeared to be certain misconceptions regarding the scope of the proposal. At the beginning of the discussion, the representative of Italy had drawn attention to the important fact that if the dangerous goods were marked in accordance with the law applicable in the country where they were to be delivered, the present provision did not apply. In other words, the aims behind the proposal were already taken care of, albeit indirectly, in the present provision. The Finnish proposal was incomplete in certain respects since it did not deal with the duty of the customer or person handing dangerous goods over to the operator to mark, label, etc., the goods concerned. As that was covered in article 9 as it stood, no amendment was needed.

87. Mr. SCHROCK (Germany) expressed his agreement with the representative of India.

88. Mr. NAOR (Israel) said that his delegation supported the Finnish proposal. He suggested that, to clarify matters, the information must be given to the operator by the person referred to as having been required to do so in article 9 (b).

89. The CHAIRMAN invited the Committee to vote on the Finnish delegation's proposal (A/CONF.152/C.1/L.55).

90. There were 15 votes in favour, 15 against and 4 abstentions.

91. The proposal was not adopted.

The meeting rose at 12.35 p.m.

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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 12th MEETING

Held at the Austria Center Vienna,
on Wednesday, 10 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

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Article 9 (continued)

Article 10

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within five working days after the date of distribution of the record to the Executive Secretary of the Conference, room U 556 (before 19 April 1991) or room E0455 in the Vienna International Centre (after 19 April 1991).

Any corrections to these records will be consolidated in a single corrigendum, to be issued shortly after the end of the Conference.

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The meeting was called to order at 2.40 p.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 9 (continued) (A/CONF.152/C.1/L.21, L.50)

1. The CHAIRMAN called attention to document A/CONF.152/C.1/L.21, submitted by the delegation of Spain. It was pointed out that the English version of draft article 9 used the expression "handed over to an operator". The Spanish delegation had suggested that the expression used should be "taken in charge by an operator", in order to bring the wording of the provision into line with the rest of the Convention, and particularly article 3.

2. The suggestion in document A/CONF.152/C.1/L.21 was referred to the Drafting Committee.

3. After a procedural discussion between the CHAIRMAN and Mr. FATHALLA (Observer, United Nations Environment Programme) concerning the admissibility of the proposal submitted by the United Nations Environment Programme (UNEP) in document A/CONF.152/C.1/L.50, Mr. RUSTAND (Sweden) and Mr. SOLIMAN (Egypt) formally endorsed the proposal for consideration by the Committee, without prejudice to the position they might take on the change for which the proposal called.

4. Mr. FATHALLA (Observer, United Nations Environment Programme) said that UNEP believed that article 9 as drafted failed to take certain international legal instruments into consideration, in particular the International Convention for the Safety of Life at Sea (SOLAS, 1974), the Hamburg Rules and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. The instruments in question prohibited the transport, including the export, of dangerous goods unless they were marked, labelled or packed in accordance with various rules and regulations. Moreover the introductory wording of the article, as drafted by the Commission, did not take account of the fact that if the rules and regulations he had alluded to were not respected, the transport of dangerous goods could be considered illegal and treated accordingly.

5. According to the Commission's introductory wording, the operator was presumed not to know of the dangerous character of the goods in question; at the same time, he would be fully entitled under paragraph (a) of the article to take a number of radical measures, which included destroying the goods. UNEP viewed that entitlement with considerable misgivings: it would be technically very difficult for an operator ignorant of the nature of the dangerous goods to take the proper steps to deal with them, however lawful those steps might be. Indeed, his action might be counter-productive and even destructive, not only to the environment but also to himself and his property as an operator. That was why, under the UNEP proposal for paragraph (a), such steps were limited to precautionary ones, which must be taken in accordance with international or national rules and regulations.

6. In sum, UNEP was seeking to point to the existence of international as well as national rules and regulations concerning the handling of dangerous goods, proposing that they should govern the manner of dealing with such goods under article 9, and endeavouring thereby to secure the operator's respect for well-established principles whose aim was to protect not only the environment but also his own interests. UNEP fully understood that the principal objective of article 9 was to protect the operator by liberating him from any obligation to pay

(Mr. Fathalla, Observer, United Nations Environment Programme)

compensation for damage caused by his actions thereunder and by ensuring that he would be reimbursed for all costs incurred in so acting. That objective was left untouched in the UNEP proposal.

7. Mr. SOLIMAN (Egypt) supported the UNEP proposal.

8. Mr. ZHAO Chengbi (China) saw little difference in substance between the UNEP proposal and the Commission's draft. He understood the "international or domestic rules and regulations" referred to in the former to be subsumed under the expression "any law or regulation relating to dangerous goods applicable in the country where the goods are handed over" which appeared in the latter. On balance, his delegation preferred the Commission's text. He did, however, appreciate the more discretionary provision proposed by UNEP for paragraph (a). Operators of transport terminals functioned in many different ways and in many different geographical and other contexts; as had been pointed out, they were presumed to be ignorant of the nature of the dangerous goods, and yet entitled, in the Commission's draft, to take measures which might prove harmful to the environment or to property. The UNEP draft did not preclude such measures but merely diverted attention from them to precautions permitted by international or national rules or regulations, thereby strengthening the possibility of proper control.

9. Ms. SKOVBY (Denmark) suggested that the international instruments referred to by the observer for UNEP were of only limited relevance to the matter covered by article 9. She opted for the Commission's draft as being more specific and relevant to the concerns addressed in the article.

10. Mr. PAMBOU-TCHIVOUNDA (Gabon) suggested that UNEP's preoccupation with international rules and regulations might be accommodated in the Commission's draft if the introductory wording were amended to refer to any relevant law or regulation. What seemed to be an innovatory notion of compensation for damage resulting from precautions, mentioned in paragraph (a) of the UNEP text, might usefully be incorporated in paragraph (a) of the Commission's draft.

11. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) favoured the Commission's draft as far as the introductory wording was concerned.

12. Mr. FILIPOVIĆ ((Yugoslavia) said that the UNEP proposal, albeit interesting, addressed the issue from the point of view of international public law and was concerned with issues such as precautions, prevention and responsibility, while the principal purpose of the draft article was to cover the specific matters of compensation and liability. The wording of the UNEP proposal was, he believed, unsuitable for the Convention and he could not endorse it.

13. Mr. ILLESCAS (Spain) was also unable to approve the UNEP proposal. With regard to the introductory wording, the Commission's draft was both broader-based - since the laws or regulations it referred to could be either international or domestic - and more specific, in that they were clearly described as being those relating to dangerous goods. Moreover, with regard to paragraph (a), he submitted that most international or domestic rules and regulations on the subject of dangerous goods covered, by and large, all types of transport operators, and not merely operators of transport terminals. The introduction into the present draft Convention of direct references to instruments of wider scope could lead to difficulties, if only in treaty law, by inadvertently opening the door to looser interpretations of those instruments and consequent harm to their scope and application. His delegation preferred the Commission's text of paragraph (a), which had the merits of clarity, of specifically addressing the case of transport

(Mr. Illescas, Spain)

terminal operators, and of indicating what the operator could and must do in the case spelt out in the introductory wording. It offered the additional advantage of pointing to specific and lawful measures for dealing with the situation.

14. Mr. FALVEY (United States of America) favoured the existing text, for the reasons put forward by the previous speaker. While his delegation had great respect for the concerns of UNEP, it believed that the original text merely provided a special rule to deal with a limited set of circumstances that might confront the operator, enabling him to take certain precautionary actions, all in accordance with existing law, and subsequently to recover their cost. His delegation also thought, however, that there was a legitimate basis for concern that that special rule might be interpreted on some future occasion as the only rule governing dangerous goods in the custody of the operator of a transport terminal. He therefore suggested that the report of the Conference should include the essence of a report by UNCITRAL in its Yearbook, volume XX: 1989 (p. 17, para. 124), which made it clear that that was not the case. There were many other rules dealing with the terminal operator's right of recourse with respect to liabilities he might incur towards third persons as a result of having dangerous goods imposed on him and on his premises. The concerns of UNEP could be dealt with similarly, by expanding the appropriate paragraph in the Conference's own report so as to make it clear that the special rule did not pre-empt other rules and regulations, including those in international conventions, that dealt with the marking, labelling, packaging and disposal of dangerous goods, as well as those that might provide rights of recourse for protection against liability towards third persons harmed by those goods.

15. Mr. HORNBY (Canada) said that his delegation was inclined to support the proposal. He believed that the purpose of the rule in article 9 was to establish the notion, consistent with the various conventions on liability, that the operator of a transport terminal might take certain precautions when handling unmarked dangerous goods and that he was entitled to receive reimbursement for the costs so incurred. The article was not intended to set out rules for the handling of goods but was a renvoi to applicable national law or international law. The language proposed by UNEP met that purpose better, making it clear that the Convention was not establishing rules on the handling of dangerous goods but was restricted to the narrower question of liability and reimbursement. The proposed rewording established that the precautions were to be taken in accordance with international or national rules and regulations and were not necessarily limited to those listed in subparagraph (a) of article 9 as drafted by the Commission.

16. Mrs. PIAGGI DE VANOSSI (Argentina) said that her delegation would support the original text, for the reasons given by the representative of Spain.

17. The CHAIRMAN invited the Committee to vote first on the introductory wording of article 9 as proposed by UNEP in document A/CONF.152/C.1/L.50.

18. The proposal was rejected by 21 votes to 6 with 4 abstentions.

19. The CHAIRMAN invited the Committee to vote on subparagraph (a) of the UNEP proposal.

20. Subparagraph (a) was rejected by 19 votes to 9 with 2 abstentions.

21. The CHAIRMAN invited the Committee to vote on subparagraph (b) of the UNEP proposal.

22. Subparagraph (b) was rejected by 21 votes to 4 with 6 abstentions.

23. The proposal as a whole was rejected.

24. Mr. FATHALLA (Observer, United Nations Environment Programme) requested the Executive Secretary to read out a statement by the International Maritime Organization (IMO) on article 9 of the draft Convention. The statement had been given him for presentation to the Conference so that it could be reflected in its report.

25. Mr. BERGSTEN (Executive Secretary) read out the statement. It noted that, in accordance with chapter VII of the International Convention for the Safety of Life at Sea (SOLAS, 1974), the carriage of dangerous goods by sea was prohibited unless provisions incorporated in that Convention concerning the treatment of such goods were strictly observed; that since SOLAS had been ratified by 111 States, those provisions were legally enforceable world-wide; and that the minimum requirements for the transport of dangerous goods by all modes contained in the United Nations recommendations prepared by the United Nations Committee of Experts on the Transport of Dangerous Goods enjoyed similar universal acceptance. The statement added that no operator could be expected, in the light of that background, to take in charge dangerous goods that had not been properly documented, marked, packaged and labelled; that in the case of dangerous goods, the precautions to be taken related primarily to the moment at which the operator took the goods in charge; that precautions at that stage were decisive for consideration of the operator's liability or any exemption from that liability; that the introductory wording of draft article 9 did not seem to reflect that situation; and that the article also seemed to relate primarily to dangerous goods in packaged form and should perhaps be amended by the Committee to include the operator's handling of dangerous goods and substances in bulk.

26. The statement then pointed out that, although the draft Convention established the channelling of liability on the basis of damage caused to the goods, precautionary measures to be taken in respect of dangerous goods necessarily related to damage caused by the goods, not only to "any person or property" as specified in the draft Convention, but also to the environment; and that, while IMO was primarily concerned with pollution from vessels, the importance of avoiding pollution of the marine environment from land-based sources was frequently the subject of consultations between IMO and UNEP. The statement concluded by saying that, in that regard, the need for the operator to take emergency precautions to avoid not only damage to persons or property but also environmental damage which might occur as a result of the introduction of dangerous substances into the marine environment, as in the case of the leaking of such substances after the operator had taken them in charge, should be taken into account.

27. Mr. RUSTAND (Sweden), speaking in explanation of his vote, reiterated that his delegation had not endorsed the substance of the proposal but the right of the observer for UNEP to present it.

28. The CHAIRMAN said that article 9 had been approved without amendment, subject to the decision of the Drafting Committee on the proposal by Spain (A/CONF.152/C.1/L.21).

29. Article 9, as worded by the Commission, was referred to the Drafting Committee on that understanding.

Article 10 (A/CONF.152/C.1/L.15, L.16, L.54)

30. Mr. SCHROCK (Germany) introduced the first part of his delegation's proposal in document A/CONF.152/C.1/L.16, concerning the first sentence of article 10 (1). He noted that the Japanese Government had made a similar suggestion in paragraph 3 of its written comments on the draft Convention (A/CONF.152/7). Article 10 (1) provided a right of retention for the operator during the period of his responsibility. At its twenty-second session, UNCITRAL had adopted a proposal that, in substance, gave the operator a right of retention over the goods for the cost of services rendered after his period of responsibility, as defined in article 3, had expired. That decision had been reflected in detail in paragraph 126 of the report of UNCITRAL on the work of its twenty-second session (A/44/17), which stated that the proposal had been accepted and referred to the drafting group. That decision was embodied in substance in the first part of the German proposal. It had not been given effect by the drafting group, as the Commission had noted in paragraph 207 of the report. His delegation felt that the Conference should implement the decision and amend the draft Convention accordingly.

31. Mr. OCHIAI (Japan) said that his delegation supported the German proposal for article 10 (1).

32. Mr. RUSTAND (Sweden) said that the decision in question had been taken in response to a proposal from the delegations of Finland and Sweden. Paragraph 9 of his Government's written comments on the draft Convention (A/CONF.152/7/Add.1) also spelt out the failure to reflect it in the draft Convention. The text of article 10 (1) on which the Committee was to base its discussion should therefore be amended by the German proposal.

33. Ms. SISULA-TULOKAS (Finland), Mr. TARKO (Austria) and Mr. HORNBY (Canada) supported the German proposal for article 10 (1).

34. The CHAIRMAN said that the proposal was intended to cover the marginal period when the operator no longer had responsibility for the goods but still had them in his keeping. Storage fees, for example, might accrue after the time when the goods should have been collected by the person entitled to receive them.

35. Mr. FILIPOVIĆ (Yugoslavia) said that under the Yugoslav legal system the right of retention depended on the goods still being in the operator's hands. It should be made clear, therefore, that the addition of "and after" meant that the goods must still be in the operator's custody.

36. Mr. SCHROCK (Germany) said that it was implicit in the right of retention that the goods should be in the hands of the operator. He would hesitate to introduce the notion of "having in custody" since the Convention contained the general principle of "taking in charge". Personally, he would prefer to have the paragraph more closely related to article 3, an idea implicit in the conclusions reached on the subject by UNCITRAL at its twenty-second session.

37. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that his delegation preferred the text of the Commission's draft. The use of the term "after" might imply that there was no time limit to the right of retention. The operator could enter into a separate contract with regard to costs incurred after the goods had been placed at the disposal of the person entitled to receive them.

38. Mr. ROJANAPHRUK (Thailand) agreed with the representative of Yugoslavia that the right of retention had nothing to do with the period of responsibility. The

(Mr. Rojanaphruk, Thailand)

aim of the German proposal was to cover the entire period of custody by the operator, but the sentence as it stood did that anyway, since there could be no right of retention if there were no goods to be retained. He suggested that the first sentence of article 10 (1) should end with the words "in respect of the goods".

39. Mr. SOLIMAN (Egypt) observed that under article 10 (1) of the Commission's text the operator would have no special priority in exercising his right over the goods. He therefore supported the proposed amendment, which would strengthen the operator's right of retention.

40. Mr. AL-ZABEN (Saudi Arabia) said he would not object to the addition of the words "or after" to the first sentence of article 10 (1). According to article 3, however, the operator's period of responsibility began when he received the goods and ended when he delivered them to the customer. Who would be responsible if the goods were damaged after that?

41. Mr. SULEIMAN (Nigeria) welcomed the enhanced right of retention which the operator would enjoy under the German proposal.

42. Mr. LEBEDEV (Union of Soviet Socialist Republics) was reluctant to accept the proposed amendment. The addition of the words "or after" might create an imbalance among the respective rights and duties of the parties under the Convention. The extended period was undefined; it might be a week, a year or even more. Moreover, the period of the operator's responsibility was that defined in article 3; it ended when the operator placed the goods at the customer's disposal. However, under article 10 he might retain the goods subsequently. The term "retention" might have different meanings in different legal systems; it might be construed to mean either that the goods could be held in the same place, or that they could be held wherever they were. Also, the addition of the words "or after" to the first sentence might conflict with the second sentence of the paragraph, which referred to arrangements "extending" the operator's security in the goods. That term too might prove misleading if, as in Russian, it implied an extension in time. All in all, he felt that the proposed amendment would not effect any practical improvement in the relationship between the operator and the customer. Admittedly, the purpose of the amendment was to facilitate transport operations after the expiry of the operator's period of responsibility, but it was uncertain whether the contractual relationship between operator and customer would continue once the goods were no longer in the operator's charge.

43. Mr. RUSTAND (Sweden) was surprised by the objections voiced to the German proposal for article 10 (1), since it was not a true amendment to the text in document A/CONF.152/5 but simply a correction of it to bring it into line with the text approved by UNCITRAL in 1989. The origin of the present difficulty lay perhaps in the wording of article 3, which provided that the period of responsibility ended with the handing over of the goods to the customer or, alternatively, with them being placed at his disposal. The right of retention must of course cease either when the customer paid his debt to the operator or when the operator exercised his right under the applicable national law to sell the goods. But it would be inequitable if, when the customer came to collect the goods, the operator was obliged to surrender them without compensation for extra costs incurred because of delay imputable to the customer.

44. The CHAIRMAN said that in the French legal system the right of retention covered all costs incurred by keeping goods in storage.

45. Mr. WOOLLEY (Institute of International Containers Lessors), speaking at the invitation of the Chairman, asked the representative of Germany whether national law would govern the duty of care involved in services performed after the end of the operator's period of responsibility.

46. Mr. SCHROCK (Germany) confirmed that it would.

47. Mr. RAO (India) said that the German proposal for article 10 (1) was acceptable and he could support it. In the Indian legal system, the principle it enshrined was found in the contract of bailment: if the bailee rendered services associated with his duties in respect of the bailed goods, he was entitled, in the absence of a contractual provision to the contrary, to retain them until he had been duly reimbursed for those services. If the proposal was thought to be too open-ended, a provision might be added to the effect that the right of retention would cease when the operator was reimbursed for the costs and claims incurred. That would spell out an idea which was already implicit in the proposed amendment.

48. Mr. SCHROCK (Germany) said the existing text of the amendment was adequate for that purpose.

49. The CHAIRMAN said that the addition suggested by the representative of India might prove a useful clarification and could be added by the Drafting Committee. He invited the Committee to vote on the German proposal for article 10 (1) (A/CONF.152/C.1/L.16).

50. The proposal was adopted by 21 votes to 7, with 8 abstentions.

51. Mr. SCHROCK (Germany), introducing the proposal in document A/CONF.152/C.1/L.16 to delete paragraph 3 of article 10, observed that paragraphs 1 and 3 of the article dealt with different issues. Paragraph 1 introduced the notion of a right of retention of the goods, a right which would not necessarily entitle the holder to sell them unless national law so allowed. The first sentence of paragraph 3 appeared to state a rule of conflict of laws that the right to sell the goods was governed by the place where the goods were located; that at least was the interpretation given by members of the United States delegation in an article published in October 1990 in the Journal of Maritime Law and Commerce. During the preparatory work for the Conference it had been accepted that possible conflicts between the right of sale and any property rights of third parties in the goods should not be dealt with by the Convention. However, the second sentence of paragraph 3 excluded from the right of sale containers, pallets and similar articles of transport or packaging, thus apparently setting aside the conflict of laws rule. As a result the entire paragraph was somewhat obscure. On a literal construction of the second sentence, the conflictual rule in the first sentence would not apply, giving way instead to the general principles of private international law.

52. His Government had doubts about splitting up the conflict of laws rule as between different categories of goods. In the first sentence of the text a unified conflict of laws rule was laid down for movables in general, but was immediately followed by a provision implying that containers would be dealt with according to the applicable national law. It would be better not to include in the draft any provisions dealing with the property rights of third parties in the goods. All issues relating to the sale of goods and the rights of third parties in the goods should be dealt with by the applicable national law according to the general principles of private international law.

53. Mr. TARKO (Austria) supported the proposal to delete paragraph 3. The first sentence of the paragraph was not helpful; it merely stated a conflict of laws rule without any attempt at unification, whereas the purpose of the Convention was to unify the law on the subject. A mere reference to the law of the State where the goods were located added nothing and the sentence could well be deleted. As to the second sentence, it was not clear what was supposed to happen to containers, pallets and other articles of transport or packaging. Was the operator entitled to sell them? Was that question governed by national law, and if so by which national law? If the Committee decided to delete paragraph 3, it should also delete paragraph 4; without the paragraph about the right to sell the goods, there was no need to stipulate how the right was to be exercised.

54. Mr. SULEIMAN (Nigeria) said his delegation would support the proposal to delete paragraph 3 provided that the Convention nevertheless safeguarded the operator's right to sell all or part of the goods to defray his expenses.

55. Mr. FILIPOVIĆ (Yugoslavia) supported the German proposal to delete paragraph 3, for the reasons given by the sponsor.

56. Mr. WOOLLEY (Institute of International Container Lessors), speaking at the invitation of the Chairman, said that the German proposal would not materially affect the industry he represented. For the benefit of those who were unfamiliar with the container leasing industry, it would be useful to explain how the kind of provision in question had arisen.

57. The Institute of International Container Lessors was the trade association for the international container leasing industry and its comments on the draft Convention were contained in document A/CONF.152/7. To understand how the exception for containers, pallets or similar articles appeared in paragraph 3 of article 10, it was necessary to understand something of the business relationships involved. There were 6.2 million 20-foot equivalent units of containers in the world, permanently marked with the owner's code, which was registered with the International Container Bureau; in addition, each container had a number particular to it. Containers were permanent means of transport with an approximate life of 7-15 years. They were not goods in the general sense and were regulated by the customs convention on containers, which allowed containers to enter a country as an instrument of international traffic without payment of duty. Half of the world's containers were owned by leasing companies, the other half by ship lines; those owned by leasing companies were leased to and used by ship lines. They were leased for periods of a much shorter duration than their useful life, from two months to five years. While on lease to ship lines, the leasing company did not know where the containers were. When the container went on lease, it started from a depot where it had been stored; when it was returned to the leasing company it was returned to the depot. There were approximately 1,000 depots around the world and the relationships between depots and leasing companies and between depots and ship lines were regulated by contract. One of the Institute's concerns was that unless due care was taken, depots would be construed as terminals.

58. Its major concern, however, was where a ship line went bankrupt and left containers at a terminal. The Institute did not consider that the terminal should be able to sell the containers belonging to the leasing company and believed that under the laws of many countries represented at the Conference the terminal had the right of retention, but that that right did not necessarily give it the right of sale. Under some circumstances there might be a right of sale but usually only with a court order. The German proposal to delete paragraph 3 of article 10 would, as he understood it, put the issue back in paragraph 1, which gave the operator the

(Mr. Woolley, Institute of International Container Lessors)

right of retention of the goods, namely the containers with other goods in them. The national law would then apply as to what the nature of that right of retention was. While in many countries it was fairly clear, in the United States it would be confusing. Marginally, therefore, the Institute was in favour of retaining paragraph 3. That would allow a claim to be made, or the possibility of satisfying a claim by sale to the extent permitted by the law of the local State, except for containers, pallets or similar articles. It would also illustrate to a common law lawyer what was meant by the right of retention. In the absence of that provision, lawyers in countries like the United States were likely to wonder what the right of retention meant. The resulting situation would be very confusing. At present there were probably jurisdictions in the United States where there would be a right of sale and others where there might not. He had not seen any decisions that would confer a right of sale but there were some that would prevent one.

59. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) supported the German proposal to delete paragraph 3.

60. Mr. ZHAO Chengbi (China) said that in his delegation's view, the operator's right of retention and his right of sale were totally different legal notions, but they should be connected at a certain level. If the operator was given the right of retention only, and deprived of the right of sale, he would be unable to get proper compensation. That would cause considerable difficulties for operators and might even result in their bankruptcy. The law on the right of retention varied greatly from country to country and the draft Convention was intended to settle such conflicts of law and bring about some uniformity in the matter. The text as it stood took into account the operator's rights and interests and the differences between national laws. His delegation was therefore unable to support the German proposal to delete paragraph 3.

61. Mr. ROMAN (Belgium) said that his delegation fully understood the reasons for the proposal, but given that the Convention was intended to apply world-wide, it preferred to retain paragraph 3 for the sake of clarifying it.

62. Mr. RUSTAND (Sweden) said that the problem with the Convention was that it had very little unifying effect with regard to the right to sell the goods by referring to the applicable national law. The Swedish delegation would have preferred the Convention to contain rules that would have such an effect, but acknowledged that it was impossible to introduce them at such a late stage in the consideration of the Convention. Sweden had no problems with the second sentence of paragraph 3, as its own laws were adequate to cover the matter. However, it believed that from a strictly logical and legal point of view the whole of paragraph 3 might usefully be deleted and, as a consequential amendment, paragraph 4 as well.

63. Mr. ABASCAL (Mexico) said that his delegation preferred to retain the text as drafted by the Commission and did not agree that the first sentence of paragraph 3 failed to add anything to the Convention. The reference to the law of the State where the goods were located was a specific and important stipulation which helped to meet the objective of uniformity - something particularly useful in view of the differences between national laws, which the discussion had highlighted. Another reason for its retention, put forward by the representative of the Institute of International Container Lessors (IICL), was that it would make the Convention more acceptable generally. Finally, the paragraph expressly stated that the operator had the right to sell the goods even though that right was subject to the law of the State where the goods were located. That would make the Convention more

(Mr. Abascal, Mexico)

attractive to terminal operators because it would guarantee their rights more forcefully.

64. Mr. NAOR (Israel) supported the German proposal to delete article 10 (3). His delegation considered that paragraph 4 should also be deleted and requested Germany's opinion on that point.

65. Ms. ZAWITOSKI (United States of America) said that her delegation could not support Germany's proposal to delete paragraph 3, for the reasons stated by the representatives of China, Mexico and IICL. The first sentence of the paragraph did add something to the Convention as far as the United States was concerned, because her country had perhaps as many as 50 different laws regarding an operator's right to sell goods which he had retained. The United States delegation therefore considered that the force of a treaty provision was needed in order to give some uniformity to the laws within its own country, not to mention uniformity on a world scale.

66. Mr. FILIPOVIĆ (Yugoslavia) said that the problem really lay in the stipulation of a conflict of laws rule in paragraph 3, because if the Convention implied that for the right of sale the law was immaterial, the national law would have to apply and would not be affected by the international instrument. Where the right to sell existed, the most important issue was how the goods were to be sold, whether privately or publicly. As such matters could not be covered by the Convention, the deletion of paragraph 3 would eliminate the conflict of laws rule; it would not help to introduce a right of sale into a national law.

67. Mr. SCHROCK (Germany) said that the second sentence of paragraph 3 did not reflect a statement which had been made in the article in the Journal of Maritime Law and Commerce to which he had referred earlier, namely that UNCITRAL had agreed that containers already marked as being owned by third party lessors should not be subject to sale. The sentence simply stated that the preceding sentence did not apply.

68. Before the Committee voted on his delegation's proposal for article 10 (3), he wished to know what principle the Committee would be voting on: whether on the unified exclusion of the right of sale with respect to containers; or on the issue that with respect to containers the general conflict of laws rules should apply, and with respect to any other movables the unified conflict of laws rule, which referred to the place where the goods were located, should apply.

69. The CHAIRMAN said that it was clear from the historical background to paragraph 3 of article 10 that the provision laid down a unified rule of law; indeed, the first sentence contained a general rule recognizing that the operator had the right to sell the goods over which he had already exercised his right of retention. The provision could not therefore be interpreted as a conflict of laws rule. He doubted whether any State represented at the Conference would wish the operator, having exercised his right of retention over the goods, to be unable to exercise a right of sale over them, and consequently wish the existing text to be discarded. If the reference to the law of State where the goods were located was not strictly necessary, it might be deleted.

70. Mr. ABASCAL (Mexico) said that his delegation could not agree to the deletion of that reference because it would bring the Convention into direct conflict with some of Mexico's constitutional provisions.

71. Mr. RUSTAND (Sweden) said that in the case of a federal State composed of 50 States, the reference to the applicable law could not possibly have a unifying effect.

72. Mr. ZHAO Chengbi (China) said that if the Convention stated clearly that the operator had the right of sale, it would go a long way towards unifying national laws. If the Committee voted against the German proposal to delete paragraph 3, the Commission's text would clearly need some amendment. He agreed with the Chairman's suggestion that some thought might be given to whether the Committee should maintain the reference to the law of the State where the goods were located.

73. Ms. ZAWITOSKI (United States of America) said that her delegation supported the Chairman's view that if paragraph 3 were retained the phrase "to the extent permitted by the law of the State where the goods were located" might be deleted.

74. Mr. SCHROCK (Germany) said that he did not consider that his question regarding the interpretation of the second sentence had been fully answered. As a judge himself, he considered that any judge who had to decide a case on the basis of the text of that sentence alone, without reference to its history, would be at a loss to know how to interpret the first part of that sentence.

75. Mr. MESCHERYAK (Ukrainian Soviet Socialist Republic) said that the German proposal certainly had its merits and deserved close attention. However, the problems it raised might be solved if the text of the paragraph were made more explicit, although as far as his delegation was concerned the existing text was sufficiently flexible and well balanced.

76. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that if paragraph 3 was deleted the sale of retained goods would not be possible because it would not be mentioned. It would then be logical to delete paragraph 4, which stemmed from the idea contained in paragraph 3.

77. The CHAIRMAN invited the Committee to vote on the German proposal to delete paragraph 3 of article 10 (A/CONF.152/C.1/L.16).

78. The proposal was rejected by 21 votes to 9, with 3 abstentions.

79. The CHAIRMAN said that the Committee might now decide whether to amend paragraph 3; delegations might consider the possibility of deleting the phrase "to the extent permitted by the law of the State where the goods are located", although he was aware that that would create serious problems for some States, including Mexico.

80. Mr. SCHROCK (Germany), speaking on a point of order, requested that any amendments proposed to paragraph 3 should be circulated in writing before being discussed.

The meeting rose at 5.35 p.m.